IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 565 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PATEL KANUBHAI AMTHARAM PROP. OF ASSAM TEA DEPO - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR AM PAREKH for Applicant(s) : 1,
MR.H.L. JANI, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,
MR JAL SOLI UNWALA for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 14/12/2006

ORAL JUDGMENT

The petitioner-original accused has approached this Court by way of this Criminal Revision Application praying that,

> “10(B) Your Lordships may be pleased to quash and set aside the impugned order dated 16.06.2006 passed below exh.76 in Criminal Case No.4023/ 2002 by the learned JMFC, Mehsana and be further pleased to direct the learned JMFC, Mehsana to take the petitioner's hand-writings and send the same for opinion of the Hand-Writing Expert.”

2. The facts of the case are that respondent no.2 herein, Prajapati Bhikhabhai Maganlal, the original complainant filed a complaint under sec.138 of the Negotiable Instruments Act, inter alia, contending that the accused had issued a cheque on 01.07.2002 for a sum of Rs.6,01,026/-, bearing No.173899 of Bayad Nagrik Sahkari Bank Limited, Bayad.

This cheque was deposited by the complainant in Sarvodaya Commercial Coop. Bank Ltd, Head Office, Mehsana. On 08.07.2001 (read 08.07.2002) the cheque was dishonoured on account of insufficiency of funds in the Bank account of the accused.

The case of the accused is that the blank cheque was given as security to the complainant without filling in the date, name and the amount. The said cheque was

in the custody of the complainant. The complainant has filled in the amount adding 2% interest.

3. The case (Criminal Case No.4023/ 02 before the Court of the learned JMFC, Mehsana) proceeded. The accused examined himself on oath and deposed that the cheque bearing No.173899 is not in his own hand writing; that the amount and the name mentioned in the cheque, is not written in his own hand writing and therefore, the opinion of the hand writing expert is required to be taken. Therefore, application, exh.76 was filed.

4. The said exh.76 is dismissed by the learned Judge, with cost by order dated 16.06.2006, which is the subject matter of this Criminal Revision Application. The learned Judicial Magistrate, First Class, Mehsana [hereinafter referred to as JM(FC)], has taken into consideration the relevant aspects of the case. In para 4 it is recorded that the case of the accused is that the cheque was given towards security and it bears the signature of the accused. Therefore, the decision of the Calcutta High Court, reported in **2002 DCR 221** relied upon by the learned

advocate for the accused, is not applicable to the facts of this case.

The learned JM(FC) has further recorded that the complaint is filed under sec.138 of the Negotiable Instruments Act and the cheque in question is produced at exh.24. The deposition of the complainant is at Exh.22, whereas Exh.61 is the Purshis given by the complainant declaring his evidence to be closed. Thereafter, the statement of the accused is recorded. The evidence of the accused on oath is at Exh.64, wherein the accused has admitted that the cheque in question was issued by the accused from Account No.875 after signing the same. The accused was given sufficient opportunity for producing the evidence in support of the contention that the details in the cheque were not filled in by him.

In para 5, the learned JM (FC) has recorded that in the cross examination the complainant has denied that he has filled in the name and the amount in the cheque. The cheque bears a rubber stamp of the date and no particulars with regard to as to who filled in the 'amount' and the 'name' in the cheque has not

come on record. It is on record that the cheque was in the custody of the complainant. But at the same time it is also on record that the accused did not give any notice to the complainant about misuse of the cheque.

The learned JM(FC) after recording that, the accused did not make it clear as to with whose hand writing he wants to tally the contents of the cheque by sending the same to the Hand Writing Expert, has rejected the application.

5. Learned advocate Mr.A.M. Parekh for the petitioner placed reliance on a decision of this Court in the matter of Madhubhai Gandabhai Patel Vs. Joitaram Jividas Patel and another reported in 2005 (3) GLH 535. The learned advocate relied upon the following observations made by this Court in para 8:

> " .. .. If the matter is examined in the light of the same, it appears that as per law the accused has right to lead evidence for supporting the defence in the proceedings under section 138 of Negotiable Instruments Act. The presumption of law in

respect of the contents of the cheque can be rebutted by leading cogent evidence for such purpose. If during the course of hearing the court finds that it is necessary to forward the cheque to the handwriting expert, it may do so, but without there being any supporting evidence for such purpose led by the accused, it cannot be asserted by the accused as it is that that the cheque may be sent to the handwriting expert by raising dispute that the cheque was signed blank and the contents are not written by the accused. The Ld.Magistrate has found that the present application is with a view to delay the proceedings and therefore, the Ld.Magistrate has rejected the application. It appears that if the right of the accused to lead the evidence including by examining the handwriting expert is foreclosed for all times to come it may seriously prejudice the defence. Therefore, the Ld. Magistrate ought to have exercised the discretion by leaving the said stage open after the proper evidence is led by the accused for supporting the defence that the cheques were signed blank and the contents were not written by the accused. As the exercise of discretion by the Ld. Magistrate may result into causing prejudice to the defence, if the order is read for closing the right of leading evidence on

> behalf of the accused including by examination of handwriting expert it may result into serious prejudice to the defence. Therefore, I find that the order passed by the Ld. Magistrate as well as Ld. Sessions Judge which impugned in this petition deserve to be interfered with to that extent."

The learned advocate for the petitioner submitted that in view of the aforesaid judgement, the learned Magistrate ought to have granted the application and ought to have referred the cheque in question to the Handwriting Expert.

6. Mr.Jal Soli Unwala, learned advocate for respondent no.2 herein submitted that the said decision is not applicable to the facts of the present case. He submitted that in the present case the evidence of the complainant is over. He is examined at exh.22. After the evidence of the complainant side was over, Purshis, Exh.61 was filed declaring the evidence of the complainant closed. Thereafter, the statement of the accused was recorded. He has produced evidence on oath vide

Exh.64, wherein he has admitted that he had signed the cheque and had issued the same from his Account No.875. Learned advocate Mr.Unwala submitted that the when the complainant was examined the accused had full opportunity to cross-examine him. Thereafter, when the statement of the accused was recorded, he had full opportunity to put forward his case. Even thereafter, when he has examined himself at exh.64 and produced the evidence on oath, he could have raised the contention which he is now trying to raise by the application in question. But then he did not do so. The learned advocate submitted that thus, the facts of the case before this Court are different than that of the decision in the matter of Madhubhai Gandabhai Patel Vs. Joitaram Jividas Patel and another (supra) and hence the ratio of that case is not applicable to the facts of the present case.

7. The learned advocate for respondent no.2 relied upon a decision of the Hon'ble the Apex Court in the matter of K. Bhaskaran Vs. Sankaran Vaidhyan Balan, reported in JT (1999) 7 SC 558. The learned advocate invited attention of the Court to para 6

of the judgement which reads as under:

> “A complaint was filed by the complainant on 4-3-1993 before the Court of the Judicial Magistrate, 1st Class, Adoor (in Pathanamthitta District in Kerala) against the accused under section138 of the Act. Among the contentions which the accused raised, one was regarding the territorial jurisdiction of the said magistrate court to try the case as the cheque was dishonoured at the Syndicate Bank's Branch Office at Kayamkulam (it is situate in another District in Kerala). Accused denied having issued the cheque, his brother (the complainant) had snatched away some signed blank cheque leaves from his possession and utilised one such cheque leaf for the present case. He also contended that the did not receive any notice from the complainant regarding dishonour of the cheque and hence no cause of action would have arisen in this case. The complaint, according to him, is not maintainable on that score also.”

Learned advocate for respondent no.2 submitted that the facts of the case before the Hon'ble the Apex Court are identical to that of the case on hand. He

submitted that the Hon'ble the Apex Court was pleased to observe in para 9 as under:

> “As the signature in the cheque is admitted to be that of the accused, the presumption envisaged in section 118 of the Act can legally be inferred that the cheque was made or drawn for consideration on the date which the cheque bears. Section 139 of the Act enjoins on the Court to presume that the holder of the cheque received it for the discharge of any debt or liability. The burden was on the accused to rebut the aforesaid presumption. The trial court was not persuaded to rely on the interested testimony of DW-1 to rebut the presumption. The said finding was upheld by the High Court. It is not now open to the accused to contend differently on that aspect.”

Learned advocate for respondent no.2 submitted that in fact in the case on hand it is clear that the present application, exh.76 was given only with a view to see that the matter is delayed. He submitted that this aspect is also taken note of and recorded by the learned JM(FC) in para 5 of the order. He submitted that it is at the fag end of the trial, after the statement of the accused was

recorded, after he produced evidence on oath, exh.64 that he had filed this application. This shows that it was only with a view to see that the complainant is deprived of fruits of the litigation, that the application was filed. The learned advocate submitted that the learned JM(FC) was right in rejecting the application, exh.76.

Learned advocate for respondent no.2 submitted that a very important aspect is considered by the learned JM(FC), namely, that the accused has not disclosed in the application as to with whose hand writing the accused wants to get the handwriting in the cheque compared with. The learned advocate submitted that it is admitted position that the cheque is issued by the accused from his Account No.875. It is also an admitted position that it bears signature of the accused himself. It is also an admitted position that the accused has not filed any complaint alleging any mischief having been played by the complainant misusing the cheque in question. In light of these facts even if it is accepted that the details in the cheque are not filled in by the accused himself and

similarly the same are not filled by the complainant also, then what? The opinion of the handwriting expert will not render any assistance in deciding the case. The learned advocate for respondent no.2 submitted that it is the settled position of law that if signature is admitted then the liability of the accused stands established and the accused has to discharge that liability.

8. In view of the aforesaid discussion, this Court finds no substance in this Criminal Revision Application. Hence the same is dismissed. Rule is discharged.

(RAVI R. TRIPATHI, J.)

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